

NTSB Order No. EA-4136

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 27th day of March, 1994

Respondent .

Docket SE-10901

¹An excerpt from the hearing transcript containing the initial decision is attached.

section 91.9 of the Federal Aviation Regulations (FAR), 14 C.F.R. Part 91,² by taking off from an airport which was closed due to construction.

The sole issue raised in this appeal³ concerns the law judge's consideration of the testimony of three eyewitnesses to the event who were not identified to respondent by the Administrator until two days before the hearing. We are asked to decide whether the law judge committed error by admitting the testimony, and if so, whether that error was harmless.⁴ For the reasons that follow, we deny the appeal.

College Park Airport, an uncontrolled airport located in Maryland, has been regularly closed for two years from 9 a.m. to 4 p.m. daily, because of ongoing Metrorail construction adjacent

²FAR § 91.9 (now recodified as § 91.13(a)) provides:

"§ 91.9 Careless or reckless operation.

No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another."

³Respondent moves for leave to file an additional brief in response to the Administrator's reply brief, asserting that a response is necessary because the Administrator mischaracterizes the record, and in which he raises, for the first time, the issue of whether the sanction is excessive. The Board's Rules of Practice provide that no further briefs may be filed, except upon specific leave of the Board upon a showing of good cause. 49 C.F.R. § 821.38(e). The entire record in this proceeding has been reviewed in the course of deciding this appeal, and respondent's further characterization of the record is unnecessary. As to the issue of sanction, respondent offers no excuse for failing to raise this issue in his appeal brief, and he is therefore foreclosed from arguing it now. In the Board's view, good cause has not been shown and the motion for leave to file an additional brief is denied.

⁴The Administrator has filed a reply brief in which he urges the Board to affirm the initial decision and order.

to the airport. A notice to airmen ("NOTAM") has been issued each day by the airport manager to the local flight service station, and the runway has been closed by the placement of large (8 feet wide by 35 feet long, according to one witness) orange-colored plastic X's, which are weighted down with sandbags, in the center of and at each end of the runway.

According to one of the Administrator's witnesses, a pilot on a taxiway waiting with his aircraft engine running for the runway to open just before 4 o'clock on the day in question, respondent took off when construction workers were walking down the runway to remove the X's. According to him, the construction workers had to run in order to avoid respondent's aircraft. The construction foreman testified that he was in his yellow pick-up truck, at one end of the runway, waiting for one of his men to retrieve the X's. According to the foreman, it was not yet 4 o'clock and he had the rotating beacon and 4-way flashers operating on his truck when he saw the aircraft take off. He claims that the aircraft just missed hitting a sandbag. (TR-96).

He also testified that he saw one laborer on the runway. (TR-98).

The assistant airport manager testified that it was his job to sweep the runway of debris after the X's were taken up, and to then radio the operations office to advise that the airport was open. He testified that he was waiting in the fire rescue truck when he observed respondent's aircraft take off at 4 o'clock, "give or take a few minutes." (TR-120). He saw one man still

taking up X's when the aircraft flew over it, and this man had to step back in order to avoid the aircraft. (TR-121; 134). From his view, the airplane "definitely rolled over the X's." (TR-142). The safety supervisor for the construction company was just about to step into the airport office when he saw the airplane take off. He testified that his foreman then called him on a company radio and acknowledged to him that the aircraft had taken off before the construction crew had re-opened the runway.

The safety supervisor believes it was between 3:45 and 4:00 o'clock. When he met his foreman on the runway, he observed that one or more X's were still on it. (TR-150).⁵ The airport manager testified that she saw respondent get into his aircraft, and she saw the last part of his take-off roll. She looked at the clock in her office, which showed it was two minutes before 4 o'clock. (TR-268).

Respondent, who at the time flew regularly out of this airport, does not dispute that the airport was closed until 4 o'clock on the day in question, and he admits that he had obtained the NOTAM from the flight service station that day. He claims, however, that it had to have been after 4 o'clock when he

⁵This witness prepared a report of the incident for the review of the airport manager, who also prepared a statement, and both were provided to respondent on September 9, 1991. The report indicates that at 4 o'clock "our crews were staged and ready to remove the orange crosses from the runway when the above noted plane taxied and took off." (Administrator's Exhibit A-2).

In response to respondent's request for the names of all eyewitnesses to the incident, the Administrator responded, "The Administrator refers respondent to the attached witness statements."

took off⁶ because he saw no construction crews, no trucks, and no people on or near the runway. He believes that the X's had already been removed from the runway although he concedes that he could not see the runway immediately in front of him when seated, because his aircraft is a "tail-dragger." Respondent asserts that all of the Administrator's witnesses are lying.

Respondent presented the testimony of other pilots who frequented the airport, and they agreed that respondent was not well-liked by the College Park airport manager.⁷ These other pilots also testified that the airport was "chaotic" during the construction and that they would always check the NOTAMs, as well as the runway, to insure it was actually open before taking off. The law judge found that the evidence was "overwhelming" (TR-319) that respondent had taken off before the airport had resumed normal operations and he affirmed the Administrator's order in its entirety.

Respondent argues on appeal that the law judge committed reversible error by allowing the Administrator to present the testimony of the pilot who claims he was waiting on the taxiway,

⁶Respondent does not dispute that he was pilot in command of the aircraft which was observed taking off at the time in question.

⁷According to one witness, he believes airport management dislikes respondent because when respondent was much younger, he did dangerous things at the airport. (TR-85). The Administrator assessed a sanction based on respondent's prior enforcement history, although it is unclear from the record before us whether this history includes any operational violations.

the construction foreman,⁸ and the assistant airport manager, none of whom were listed as witnesses by the Administrator on the witness list he produced on September 9, 1991. According to the record, the Administrator's counsel did not learn of the existence of these witnesses until October 15, 1991, two days before the hearing. Respondent's counsel was notified immediately.

On October 16, 1991, respondent's counsel filed a motion in limine to preclude the testimony of these newly identified witnesses at the hearing. At the beginning of the hearing the law judge denied the motion, noting that the Administrator's counsel had no knowledge of these witnesses until two days before the hearing, and finding that respondent's case would not be unduly prejudiced by their testimony. (TR-10).

In the Board's view, the law judge did not abuse his discretion by refusing to exclude the testimony of these witnesses. Although we agree with respondent that it would have been a better practice for the Administrator to have conducted his investigation in a more timely manner, respondent was on notice from the incident report that the construction crew was in the vicinity of the runway. He could have reasonably anticipated that other witnesses might have been present, and could have learned of the witnesses through his own investigation. If respondent's counsel was unprepared to cross-examine or rebut the

⁸Since respondent identified this individual as his own witness in the list he served on the Administrator on October 15, 1991, we reject his claim of surprise as to that witness.

testimony of these witnesses, the appropriate remedy was for him to request a continuance, which he failed to do.⁹ Administrator v. Flowers, NTSB Order No. EA-3840 at 11 (1990).

We note that the Administrator must have sufficient evidence to support a prima facie case before bringing a certificate action. If the newly identified witnesses' testimony was necessary for the Administrator to make a prima facie case, our decision may have been different. However, as the law judge noted, the evidence against the respondent was overwhelming, and the testimony of the late-identified witnesses was merely cumulative of the fact that the event took place as alleged by the Administrator. Even though the pilot who was sitting on the runway made a positive identification of respondent, the airport manager, who respondent knew was going to testify, also testified that she saw respondent board the aircraft before it took off and, in any event, respondent does not dispute it was he who was operating the aircraft. While the late-identified witness claims that there were construction workers on the runway when respondent took off, other witnesses corroborate the fact that there were workers, trucks, X's and sandbags still on or near the runway when respondent took off, which sufficiently refutes respondent's claims to the contrary.

⁹Respondent's counsel's claim that there is no good cause for producing the names of witnesses two days before the hearing is particularly unpersuasive when he did not produce his own witness list for the Administrator until that same day.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;
2. The law judge's initial decision and the Administrator's order are affirmed; and
3. The 120-day suspension of respondent's commercial pilot certificate shall commence 30 days after service of this order.¹⁰

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HAMMERSCHMIDT, and HALL, Members of the Board, concurred in the above opinion and order.

¹⁰For purposes of this order, respondent must physically surrender his certificate to an appropriate representative of the FAA pursuant to FAR §61.19(f).